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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Reconsideration of Rate Regulation Issues; Ex Parte Filing; MM Docket No. 92-266

Dear Mr. Caton:

We understand that the Commission has various rate regulation issues under review. I discussed a number of related issues during a February 23, 1995 ex parte telephone conference with Paul D'Ari, Tom Power, Larry Walke and Cindy Jackson, all members of the Cable Services Bureau (collectively the "Staff"). In particular, the Staff was exploring the parameters of positions that clients of our Firm have taken in previous filings.

This letter serves to reiterate comments we made to Staff as well as to place additional information regarding these items on the record.

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List A B C D E

Definition/Limitation On External Costs

We are concerned that clarification of the scope of costs includable as external franchise compliance costs will prohibit certain legitimate costs from receiving external treatment. Currently, the knowledge of local franchise authorities ("LFAs") that burdens placed on a cable operator might be passed through to subscribers has helped avoid the imposition of many unnecessary costs.

Several key costs that must be included in any clarifying language include the following:

- Pole Attachments - Virtually every franchise requires operators to attach their plant to existing poles rather than set their own poles. Consequently, operators have no choice but to pay pole attachment rates, no matter how high they go. It is important to remember that not all pole attachment rates are regulated. Pole attachment rates charged by cooperatively organized companies are exempt from federal regulation[1]. Many operators have experienced steep increases in pole attachment rates recently, with one operator we are aware of forced to pay an increase of 1,000 percent. Many of these cooperatively organized companies have begun providing competing direct broadcast satellite services.

- Educational Institution Services - Franchise mandated wiring of *public* buildings is insufficiently inclusive by itself. Many times, franchise authorities require the wiring of educational institutions, including *non-public* institutions such as private and parochial schools. The costs of wiring and providing service to all educational institutions should be included as external costs.

- Cost Of Providing *All* Services - The Commission should clarify that the cost of providing *all* services to public facilities and educational institutions is an external cost. Typically, where an operator provides an institutional network, it is required to provide *both* the institutional services as well as residential cable services at no charge. The cost of both should be treated as external costs.

- Aerial To Underground Relocation - Franchises typically require operators, under certain circumstances, to remove aerial facilities and place them underground at

[1] 47 U.S.C. Section 224(a)(1) excludes cooperatively owned entities from the definition of a "utility".

substantial cost. This type of mandatory relocation should also qualify for external cost treatment.

- Mandatory Upgrade Costs - Some LFAs have mandated system upgrades as a matter of policy, even though existing facilities were not yet fully utilized. Where upgrades are mandated, all or part of the incremental cost should qualify for external treatment.

- Fees/Cost Reimbursement - Many franchises require operators to reimburse LFAs for costs incurred in a variety of activities such as renewals, transfers, franchise fee audits, etc. Other franchises require operators to pay predetermined fees for each of these events. Some franchises require both. Prior to rate regulation, operators could pass such costs through to subscribers. This served as a natural disincentive for franchise authorities to shift or impose such costs on operators. Operators have generally been able to contain such tactics by reminding franchise authorities that the operators could pass these costs to subscribers as an external cost. If external cost treatment is removed, the Commission will remove an important factor that kept the potential for abuse in equilibrium.

- FCC Regulatory Fees - Although the Commission currently allows recovery of the regulatory fee imposed on a per subscriber basis, operators face other potentially significant regulatory fees. In the *Notice of Proposed Rulemaking*[2], the Commission has proposed an increase for CARS licenses and a substantial increase in registered receive-only satellite station fees. These fees are no different in substance from the per-subscriber assessment and should be allowed for pass-through.

- State/Local Regulatory Fees - In addition to local franchise fees, operators regulated by state or territory-wide regulatory bodies (i.e., the Virgin Islands) pay regulatory fees to the regulatory bodies as well. These fees are often a fixed amount per subscriber plus additional fees depending upon the extent of individual dockets opened during each year.

Changed LFA Rate Approval Time Line

We reiterate our support of reducing the amount of time an LFA has to review rate change requests involving external or inflation issues. Any such changes would remove

[2]In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995, MD Docket No. 95-3 (Released January 12, 1995).

much of the regulatory uncertainty surrounding what should typically be routine rate adjustments. Equally as important, it helps cable operators coordinate and consolidate rate increases. Many cable operators, perhaps the vast majority, would prefer to make rate adjustments no more than once a year. Simplifying and shortening the basic tier rate adjustment procedures helps coordinate these changes with those requiring no approval on the cable programming services tier.

We also requested that the Commission clarify the following related issues:

- Affirmation that the 30-day advance rate change notice may be made before the LFA has approved the increase by using an approximate implementation date for the new rate (i.e., "On or after May 1, 1995, rates will be adjusted as follows").

- Affirmation that if the LFA approves an amount less than was reflected on Form 1210, and the 30-day notice has been given reflecting the amount reported on Form 1210, an operator may implement the reduced increase without having to give further advance notice. For example, if an operator applies for a $1.00 increase, but the LFA only approves $0.90, the operator may, following approval, implement the $0.90 without giving further advance notice to subscribers.

Expiration of External Costs

We reiterate that we support removal of the one year expiration period for external costs. This provision mandated that operator's increase rates or lose that ability in the future. Removing the expiration provision allows operators to defer rate increases if they choose, an option that is clearly in the consumer interest.

We asked the Staff whether a decrease in external cost actually triggers a 1210 filing requirement even if the decrease is offset by other increases (i.e., operators would only be required to file a 1210 if there was a net decrease in externals).

Recovery of Regulatory Lag

We told Staff that we support any change to the external cost computation that would allow recovery of all increases in external costs from the date they are first incurred. Such adjustments remove the financial penalty in delaying rate increases and permit operators to consolidate rate increases so that their occurrence is less frequent.

We agreed that a component of an adjustment should compensate operators for the time value of money. Upon further reflection, we believe that the appropriate measure of

the true time value of money is not an interest rate paid on debt, but rather, the cost of capital, reflecting the blended cost of debt and equity. While we do not believe it a fully compensatory rate, the current benchmark used by the Commission to measure cost of capital is 11.25 percent.

The mechanics of the adjustment pose challenges because operators do not know with certainty when the adjusted rates will go into effect, although under the new procedural rules, that date will be much more predictable. The date the rate increase goes into effect is important because it ends the measurement period for computing the "make-up" adjustment. One alternative is that an operator use a target date and if that date is missed, a compensating adjustment would be carried over to the next 1210 filing. In most cases, the amount of the compensatory adjustment will be *de minimis* and should not be a major concern to the Commission.

We have clarified, and reemphasize that whatever mechanism is chosen for operators to implement "make-up" adjustments, it must accommodate cycle billing considerations. As such, the implementation date of the adjustment must be flexible and allow phased-in implementation. If the make-up adjustment may be implemented at the beginning of each billing cycle, each subscriber will pay the make-up adjustment for no more than 12 months, they will merely start paying on different days.

Rates In Play

The extent to which the Commission has jurisdiction to review unadjusted rates for which no prior complaints had been filed remains a serious concern for our clients. Any proposal by the Commission that would allow Commission review of a base rate for which no complaint had previously been filed is both unsupported at law and unwarranted in equity.

According to the plain words of the statute, consumers should have had only one bite at the apple[3]. Nevertheless, most consumers have already had three bites at the apple (i.e., the initial 180 day period, rate changes on May/July 14, 1994, and first quarter 1995 going forward/external/inflation rate adjustments). Any option to further extend the period during which complaints regarding rate increases apply to both a rate increase and the

[3]47 U.S.C. Section 543(c)(3) provides that an initial complaint period shall be offered, after which, complaints may only be filed following rate increases. The implication is that the entire rate may be challenged during the 180 day period. After that, only the amount of the rate increases may be brought into question.

underlying rate would give consumers a *fourth* bite at the apple (i.e. changes during the first quarter 1996). In essence, such an option would extend the statutory 180 day period to two and a half years -- approximately 900 days!

The reason Congress limited the ability to file initial complaints on the underlying rate to 180 days was to add certainty to the process. When one considers it only takes one disgruntled subscriber to file a complaint against the operator, if no complaints have been filed in a year and a half, the operator should be afforded the benefit of the doubt that its underlying rate is reasonable.

Timing of Filings

We reiterate that most of our clients generally prefer to consolidate as much into a single rate adjustment and have fewer rate adjustment (i.e. they do not want to have an external adjustment one quarter, an inflation adjustment another and an equipment rate change yet another).

Nevertheless, Form 1205 still raises concern. The 1205 must be filed on March 1 each year for calendar year companies. We have previously been told the 1205 filing is to be treated by the LFA as an application for rate change. Therefore, the timing is out of sync with year end or 1st quarter rate increases which seem to be preferred by operators for a number of reasons. We encourage Staff to recommend action to remedy this timing problem.

Charging Less Than Permitted Rate

We have asked for a clarification that an operator may charge less than the maximum permitted rate. We have further asked that the Commission allow a carryover of such undercharges to future periods so that operators do not lose the right to charge permitted rates in the future. For example, an operator has increases in externals of $1.00, but only chooses to pass through $0.80. The $0.20 that the operator voluntarily left on the table should be available to it to pass through at a future date, rather than be permanently foregone.

Updating Calculations

We reiterate that we support any proposal that would eliminate the requirement that operator's "refresh" Form 393 computations. It is only fair that operators be able to rely on the most recent published information at the time a Form 393 is completed, and not have

to refile or restate it in the future as other information becomes available. This adds certainty to an operator's calculation.

If you require any additional information, please contact us.

Very truly yours,

HOWARD & HOWARD

Eric E. Breisach

cc: Paul D'Ari
Service List
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